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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ALI HASSEM BAHRAMBEYGUI,

Defendant and Appellant.

D073203

(Super. Ct. No. JCF37624)

APPEAL from a judgment of the Superior Court of Imperial County, Marco D. Nuñez, Judge. Affirmed in part, reversed in part; remanded with instructions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ali Hassem Bahrambeygui of nine counts for crimes against two victims, which occurred in March 2017. He contends several of the sentences imposed

were improperly duplicative under Penal Code<sup>1</sup> section 654. He further contends the recent amendment to section 12022.53, subdivision (h) requires a resentencing hearing so the court can consider its discretion in sentencing awarded for firearm enhancements. We agree and remand the matter for a resentencing hearing.

## BACKGROUND AND PROCEDURAL FACTS

### A. The Prosecution's Case

Sixty-six-year-old Elias M. lived in a studio behind a main house. On March 6, 2017, at 2:30 a.m., while Elias slept in his bed and a guest, Ariana P., slept on his floor, there was a knock on the door from the resident of the main house, Gloria Bernal. Bernal said through the door, "It's me, Gloria," and Elias told Ariana to open the door. When she did, Bernal pushed in and entered in a rush, along with two men immediately behind her. One of the men was Bahrambeygui, who held a three-foot shotgun with a metal barrel. Bahrambeygui pointed the shotgun at Elias, chambered a round, and told Elias that he was going to "fuck [him] up." Elias was scared because he believed Bahrambeygui was going to kill him.

Bernal physically held back the men and asked Elias if he was "messaging" with her car tires. Elias denied doing anything to her tires. Bernal and the others left the studio, closing the door behind them. Elias stayed in bed. Outside, Bernal talked with Ariana, saying she thought Elias slashed her tires and was a pervert. Bahrambeygui and the other man stood by and listened.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

Then, about five minutes after they left the studio, the two men returned, rushing in, and they immediately began beating Elias while he laid in bed. The men hit Elias repeatedly on the face and body, cutting his hand and upper eye, and bruising his leg, head, and neck. After the men left, Ariana returned, closed the door, and locked it.

When Bahrambeygui went into the main home with Bernal, Bernal's 13-year-old daughter, asked him what he was doing, and Bahrambeygui said Elias "did [her] mom wrong" by slashing her tires.

Elias wanted to call the police, but he felt afraid and worried the men would kill him. His eye swelled shut for about six days, and at the time of trial, his vision remained blurry, and he needed surgery to his knee.

On March 12, 2017, police interviewed Elias in connection with a separate incident, in which Bahrambeygui fired a gun at Edgar T., who was riding a bicycle in the neighborhood. Edgar's knee was destroyed in the incident.<sup>2</sup> When police interviewed Elias, he disclosed what had occurred March 6.

## B. The Defense

At trial, Bahrambeygui testified in his own defense and claimed not to be present during the beating of Elias or the shooting of Edgar.

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<sup>2</sup> Due to the limited nature of Bahrambeygui's appeal, we restrict our description of the background facts to the March 6, 2017 incident involving Elias.

### C. Verdicts

The jury convicted Bahrambeygui on all charges: mayhem (§ 203; count 1), assault of Edgar with a firearm (§ 245, subd. (a)(2); count 2), possession of a firearm by a felon with a prior (§ 29800, subd. (a)(1); count 3), assault of Elias by means likely to produce great bodily injury (§ 245, subd. (a)(4); count 5), first degree residential burglary (§ 459; counts 6 and 10), battery of Elias with serious bodily injury (§ 243, subd. (d); count 7), elder abuse (§ 368, subd. (b)(1); count 8), and criminal threats (§ 422, subd. (a); count 9).

The jury also returned true findings on all enhancements. On count 1, the jury found true that Bahrambeygui personally used a firearm (§12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53. subd. (c)), and personally and intentionally discharged a firearm, which proximately caused great bodily injury (§ 12022.53, subd. (d)). On count 2, the jury found true that at the time of the commission of assault with a firearm, Bahrambeygui personally inflicted great bodily injury upon Edgar. (§ 12022.7, subd. (a).) On counts 5, 7, 8, and 10, the jury found true that Bahrambeygui personally inflicted great bodily injury upon Elias. (§ 12022.7, subd. (a).) On counts 5, 6, and 9, the jury made a true finding that Bahrambeygui personally used a firearm. (§ 12022.5, subd. (a).)

Bahrambeygui opted for a bifurcated jury trial on prior convictions. The jury found that Bahrambeygui had a prior conviction of a serious or violent felony (§§ 1170.12, subd. (a)-(d); 667, subd. (b)-(i)) and two additional felony convictions, both

of which were committed within five years preceding the serious felony conviction.  
(§ 667.5.)

#### D. Sentencing

Before sentencing, Bahrambeygui's attorney requested that the court stay counts 2, 3, 5, 7, 8, and 9 under section 654. The court commented that the crimes "were extremely serious and violent crimes, horrific crimes," that Bahrambeygui "put people's lives in jeopardy," and that "[i]nnocent victims were grossly attacked and could have ended up dead." The court also stated that consecutive terms for counts 2 through 10 were "appropriate given the fact that the victims were particularly vulnerable," and "the crimes and their objectives were predominantly independent of each other. The crimes involved separate acts of violence or threats of violence."

The court sentenced Bahrambeygui to an aggregate term of 37 years consecutive to 25 years to life, or 62 years to life. It imposed eight years for count 1, doubled for the strike prior. It also awarded 25 years to life for the personal discharge of the firearm proximately causing serious bodily injury. The court imposed and stayed 10 years for personal use of a firearm and 20 years for personally and intentionally discharging a firearm.

The court stayed the sentence for count 2, assault with a firearm and personal infliction of great bodily injury on Edgar. Bahrambeygui received one year four months for the count 3, conviction for possession of a firearm.

The court awarded four years four months for count 5, assault by means likely to produce great bodily injury and the true findings, and four years for count 6, first degree

residential burglary and the true findings. The court sentenced Bahrambeygui to three years for count 7, battery with serious bodily injury and the true finding and stayed the three-year sentence for count 8, elder abuse and the true finding. The court sentenced Bahrambeygui to two years eight months for count 9, criminal threats and the true finding and to three years eight months for count 10, first degree residential burglary and the true finding. Bahrambeygui was also sentenced to two years for two prison priors.

Bahrambeygui timely appealed.

## DISCUSSION

### A. Section 654

#### 1. *Legal Principles*

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) This is "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341.) In determining the applicability of section 654, "[w]e first consider if the different crimes were completed by a 'single physical act' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single 'intent and objective' or multiple intents and objectives." (*People v. Corpening* (2016) 2 Cal.5th 307, 311 (*Corpening*)). If a defendant has independent criminal objectives, he may be punished for each crime committed pursuing an independent objective, even if the crimes share common acts or are otherwise part of an indivisible course of conduct. (*People v. Perry*

(2007) 154 Cal.App.4th 1521, 1525.) However, "[i]f all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1112 (*DeVaughn*), citing *People v. Centers* (1999) 73 Cal.App.4th 84, 98 (*Centers*).)

"The question of whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination." (*DeVaughn, supra*, 227 Cal.App.4th at p. 1113.) A court's expressed or implied findings on this point must be upheld if supported by substantial evidence. (*People v. Brents* (2012) 53 Cal.4th 599, 618.) This requires us to view the evidence in the light most favorable to the sentencing order and presume the existence of facts a trier of fact could reasonably deduce from the evidence. (*DeVaughn*, at p. 1113.)

## *2. Counts 6 & 10, Burglary*

Bahrambeygui contends the sentence for each burglary must be stayed because he entered Elias's studio twice with the same objective, establishing an indivisible course of conduct. The Attorney General contends Bahrambeygui's actions comprise two separate, independent transactions with different objectives. We agree with the Attorney General.

"[M]ultiple crimes are not one transaction where the defendant had a chance to reflect between offenses and each offense created a new risk of harm." (*People v. Felix* (2001) 92 Cal.App.4th 905, 915 (*Felix*).) If a course of conduct is divisible in time because "the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken," multiple

convictions and multiple punishments are appropriate. (*People v. Gaio* (2000)

81 Cal.App.4th 919, 935 (*Gaio*).)

There is substantial evidence that the first time Bahrambeygui entered the studio, his objective was to frighten Elias, while the second time he entered the studio, his objective was to batter Elias. Bahrambeygui initially entered the studio with Bernal, who was there to challenge Elias by asking him if he had slashed her tires. Before Bernal asked Elias about her tires, Bahrambeygui chambered the shotgun, pointed the weapon at Elias, and said he was going to "fuck . . . up" Elias. This was clearly a threat. Then, after Bahrambeygui threatened Elias, Bernal held him back and asked if Elias had slashed her tires. A reasonable fact finder could conclude Bahrambeygui entered the studio to assault and threaten Elias, to encourage honesty in response to Bernal's accusation or to discourage any future tire slashing.

There was a five-minute break between the time Bahrambeygui left Elias's apartment and Bahrambeygui's re-entry. After Bahrambeygui followed Bernal outside, he listened as she complained about Elias, questioning his veracity and calling him a pervert. The five-minute gap between the two entries provided Bahrambeygui with time to reflect on his next steps, making his actions divisible. (See *Felix, supra*, 92 Cal.App.4th at p. 915; see also *Gaio, supra*, 81 Cal.App.4th at p. 935.) Bahrambeygui re-entered the studio only after hearing Bernal's complaints; there is no evidence his intent was merely to threaten Elias the second time. Instead, Bahrambeygui immediately began beating Elias, doing so with such force, that months later, Elias suffered blurred vision and still required surgery for injuries to his leg. After Bahrambeygui beat Elias, he told



Bernal's daughter he had done so because he concluded Elias "did [her] mom wrong" by slashing her tires, indicating his actions were intended to punish Elias.

A reasonable fact finder could easily conclude Bahrambeygui's objective had changed from assaulting Elias the first time Bahrambeygui was in the studio to battering Elias the second time. The court at least impliedly drew this conclusion, consistent with the court's general statement that "the crimes and their objectives were predominantly independent of each other" and "involved separate acts of violence or threats of violence." Given the divisibility of his actions and the differing objectives, the court properly sentenced Bahrambeygui for both counts of burglary.

### 3. *Count 9, Criminal Threats*

Bahrambeygui contends count 9, criminal threats, must be stayed under section 654 because it has the same intent and objective as the assault, the predicate felony for the first burglary. The Attorney General contends Bahrambeygui had an additional and independent objective of battery when he entered the studio the first time. Certainly, a defendant could have more than one felonious objective when burglarizing, and here the jury instructions reflected several possibilities: criminal threat, battery causing serious bodily injury, assault likely to cause great bodily injury, or elder abuse. However, a defendant may only be punished once for different crimes completed by a single act (*Corpening, supra*, 2 Cal.5th at pp. 311-312), and there is not substantial evidence Bahrambeygui's objective was to batter Elias during the first entry into the studio.

While the elements of the crimes of assault and criminal threat differ (*People v. Williams* (2001) 26 Cal.4th 779, 786 (*Williams*) [assault]; *People v. Toledo* (2001)

26 Cal.4th 221, 227-228 [criminal threat]), there is considerable overlap in the manner in which Bahrambeygui acted to satisfy the elements. While committing the assault on Elias, Bahrambeygui made the statement which formed the basis of the criminal threat, namely that he was going to "fuck . . . up" Elias. The court made no express finding with respect to Bahrambeygui's intent in making this statement. It appears Bahrambeygui intended to scare Elias because he pushed into the studio behind Bernal, who wanted Elias to admit he had slashed her car tires. The threat was almost certainly intended to ensure that Elias would genuinely be in fear. In other words, the purpose of the threat was "to establish that the act [of chambering and pointing the weapon at Elias] by its nature [would] probably and directly result in the application of physical force [against Elias]." (*Williams*, at p. 790.) Thus, the threat was made to complete the assault on Elias rather than to constitute an independent, criminal act. Because there was but a single act in this case, the separate convictions cannot properly result in separate sentences, and the court should have stayed the sentence for count 9, along with the accompanying enhancement for personal use of a shotgun. (*People v. Calles* (2012) 209 Cal.App.4th 1200, 1221 [must stay enhancements when base term is stayed under section 654]; *People v. Guildford* (1984) 151 Cal.App.3d 406, 412 [enhancements are punishments, not offenses].)

Moreover, there is not substantial evidence Bahrambeygui intended to batter Elias when he first entered the studio; he was there with Bernal so she could interrogate Elias about her car tires. As we previously discussed, Bahrambeygui entered the studio to scare Elias. Had Bahrambeygui desired to physically harm Elias, he had opportunities to

do so before or after chambering the shotgun, at which point Bernal stepped in. He also had an opportunity to do so when Bernal left; instead, Bahrambeygui followed Bernal out. Moreover, his subsequent return to the studio to beat Elias is additional evidence that had battery been Bahrambeygui's intent during his first entry, he had the ability to act upon it.

4. *Count 5, Assault by Means Likely to Produce Great Bodily Injury*

Bahrambeygui contends the sentence imposed for assault by means likely to produce great bodily injury, count 5, must be stayed under section 654 because it is the felony underlying the burglary conviction and sentence. Bahrambeygui also argues in his reply brief that the great bodily injury enhancement attached to the assault must be stricken. We agree.

"Burglary consists of entry into a house or other specified structure with the intent to commit a felony. (Pen. Code, § 459.) Thus, ordinarily, if the defendant commits both burglary and the underlying intended felony, [section 654] will permit punishment for one or the other but not for both." (*Centers, supra*, 73 Cal.App.4th at p. 98.)

Additionally, when a defendant commits multiple crimes by completing the same act, the defendant may only be punished once for that act. (*Corpening, supra*, 2 Cal.5th at pp. 311-312.) As we previously explained, Bahrambeygui entered the studio the first time with the objective of assaulting Elias. Because the court sentenced him based on the burglary count, Bahrambeygui cannot receive a separate punishment for the assault. Thus, count 5 must be stayed.

Additionally, there is insufficient evidence to support the enhancement for infliction of great bodily injury. In reviewing sufficiency of the evidence to support an enhancement, we use the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

Section 12022.7, subdivision (a) permits the court to impose an additional consecutive term of imprisonment of up to three years if, while committing a felony, the defendant inflicts great bodily injury on a person who is not an accomplice. Here, the issue is not whether Elias suffered great bodily injury, but whether the injury was inflicted in the commission of the assault.

Elias was not physically injured during Bahrambeygui's first burglary; instead Bahrambeygui followed Bernal out of the studio after threatening Elias, without touching him. Elias's injuries were the result of Bahrambeygui's acts during his second entry into the home. Thus, the enhancement must be stricken.

### 5. Count 7, Battery

The Attorney General concedes that Bahrambeygui's sole purpose for entering the studio the second time was to commit battery. Burglary carries with it a maximum potential sentence of six years (§ 461, subd. (a)), and battery carries a maximum sentence of four years. (§ 243, subd. (d).) Because a defendant may only be sentenced once for the burglary or the underlying felony (*Centers, supra*, 73 Cal.App.4th at pp. 98-99), whichever has the longer potential sentence taking into consideration any enhancements (*People v. Kramer* (2002) 29 Cal.4th 720, 722-723), the court's sentence for burglary should stand, and the sentence for battery should be stayed.<sup>3</sup>

#### B. Amended Section 12022.53, subdivision (h)

The parties agree the amendment to section 12022.53, subdivision (h), which gives the court discretion to strike or dismiss firearm enhancements, applies retroactively. (See *People v. Francis* (1969) 71 Cal.2d 66, 75-76; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.) Bahrambeygui contends his case must be remanded for resentencing in light of the severity of the enhancement term applied to count 1 (25 years to life) and additional enhancement terms of one year four months applied to count 5 (assault by means likely to produce great bodily injury), count 6 (first degree residential burglary), and count 9 (criminal threats). The Attorney General contends remand is not appropriate here because no reasonable court would exercise its discretion in this matter. (*People v.*

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<sup>3</sup> As to both the count 10 burglary charge and the count 7 battery charge, the jury's true finding that Bahrambeygui personally inflicted great bodily injury on Elias carried a consecutive sentence of three years. (§ 12022.7, subd. (a).)

*Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [remand unnecessary if record demonstrates trial court would not have exercised discretion.]

Although we have directed the trial court to stay the enhancements to counts 6 and 9 because the base sentences must be stayed, the trial court has discretion regarding the firearm enhancements attached to counts 2 and 5. At sentencing, the trial court commented that the crimes "were extremely serious and violent crimes, horrific crimes," that Bahrambeygui "put people's lives in jeopardy" and that "[i]nnocent victims were grossly attacked and could have ended up dead." The court did not have discretion at the time of sentencing to strike the firearm enhancements. It would be speculative for us to predict what the trial court will do now that the law has changed. We cannot conclude the court would decline to exercise its discretion in this instance. Accordingly, we remand the matter, so the trial court may consider its discretion on the enhancements.

#### DISPOSITION

The sentence is vacated. The matter is remanded to the trial court with directions to conduct a resentencing hearing to consider its discretion under section 12022.53, subdivision (h), regarding the firearm enhancements. The trial court is also directed to stay the sentences for counts 5, 7, and 9, along with the corresponding enhancements imposed. We further direct the trial court to prepare an amended abstract of judgment reflecting the sentencing decisions and to deliver it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.